

S. 2290, The Fairness in Asbestos Injury Resolution Act of 2004
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Section-by-Section Analysis and Discussion

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TITLE I. ASBESTOS CLAIMS RESOLUTION

Subtitle A. Office of Asbestos Disease Compensation

Sec. 101. Establishment of Office of Asbestos Disease Compensation.

This section establishes the Office of Asbestos Disease Compensation in the Department of Labor for the purpose of providing timely and fair compensation to individuals adversely affected by exposure to asbestos in the amounts and according to the terms specified by the Act on a no-fault basis and in a non-adversarial manner.

The Office will be headed by an Administrator, appointed by the President by and with the advice and consent of the Senate for a term of five (5) years, who reports directly to the Assistant Secretary of Labor for the Employment Standards Administration. The Administrator selects from the Senior Executive Service a Deputy Administrator for Claims Administration to handle the claims resolution process and a Deputy Administrator for Fund Management to manage the Asbestos Injury Claims Resolution Fund (the Fund). The Deputy Administrators reports directly to the Administrator.

The Administrator is responsible for promulgating rules, regulations, and procedures necessary to implement and enforce the provisions of this Act, including rules to expedite claims for asbestos claimants with exigent circumstances. Other responsibilities of the Administrator include contracting services and personnel as necessary to carry out the responsibilities of the Office. The Administrator will also manage the assets of the Fund and conduct such audits and additional oversight necessary to ensure the integrity of the program.

The Freedom of Information Act applies to the Office, and the Administrator will adopt procedures for designating records submitted as confidential commercial or financial record as confidential. Information on reserves and asbestos-related liabilities submitted by any participant for the purpose of allocation of payments will be deemed confidential financial records.

Sec. 102. Advisory Committee on Asbestos Disease Compensation.

Within 120 days of enactment, the Administrator must establish an Advisory Committee on Asbestos Disease Compensation (the Advisory Committee) to advise the Administrator on all matters related to the functioning, maintenance, and administration of the Fund. This committee will be composed of 24 members appointed for three (3) year terms, except that of the first members appointed, an equal number shall be appointed for one (1), two (2), and three (3) year terms. The Administrator designates a Chairperson and a Vice Chairperson from the 24 members.

The Majority and Minority Leaders of the Senate, the Speaker of the House, and Minority Leader of the House each appoint four (4) members. Of the four, two (2) shall

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represent the interests of the claimants, at least one of whom having been recommended by national labor federations. The other two (2) will represent the interests of the participants, one of whom shall represent the interests of the insurer participants and the other the interests of the defendant participants. The Administrator appoints eight (8) members with qualifications and expertise in fields relevant to the administration of the Fund. None of the members may have earned more than twenty-five (25%) percent of their income by serving in matters related to asbestos litigation as consultants or expert witnesses for each of the five (5) years before their appointments.

The Advisory Committee shall meet at the call of the Chairperson, or the majority of its members, at least 4 times per year during the first 5 years of the asbestos compensation program and at least 2 times per year thereafter. The Administrator will provide such information and administrative support to the Advisory Committee as reasonably necessary to enable it to carry out its responsibilities.

Sec. 103. Medical Advisory Committee.

The Administrator may establish a Medical Advisory Committee to provide expert advice regarding medical issues. None of the members may have earned more than twenty-five (25%) percent of their income by serving in matters related to asbestos litigation as consultants or expert witnesses for each of the five (5) years before their appointments.

Sec. 104. Claimant Assistance.

Within 180 days of enactment, the Administrator must establish a comprehensive claimant assistance program to aid claimants in the process of submitting claims. The program is to provide for the establishment of resource centers in areas with large concentrations of potential claimants within Department of Labor facilities. Services to potential claimants may be contracted out to outside organizations, provided that such organizations do not have a financial interest in the outcome of claims filed with the Office.

Legal Assistance: The Administrator shall establish a legal assistance program to aid claimants in legal representation issues. As part of the program, the Administrator will maintain a list of attorneys who are willing to provide their services on a pro bono basis and provide the claimants notice of and information relating to available pro bono legal services and any limitations on attorneys fees. Before a person becomes a client of an attorney with respect to an asbestos claim, the attorney shall provide notice of available *pro bono* legal services available for that claim.

Sec. 105. Physicians Panels.

The Administrator shall appoint physicians with experience diagnosing asbestos-related diseases to serve on Physicians Panels for the purpose of making medical determinations and perform other functions as are necessary to carry out the Act. To serve on a Physicians Panel, a person shall be a licensed physician in any State, board-certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology, and has earned no more than twenty-five (25%) percent of their income as an employee of a participating defendant or insurer or law firm representing any party in

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asbestos litigation or as a consultant or expert witness for each of the five (5) years before appointment. The Administrator periodically determines the number of Physicians Panels necessary for the efficient conduct of the medical review and the exceptional medical claims process. Each panel will be composed of three (3) physicians with the expertise determined necessary by the Administrator, two of whom shall be designated to participate in each case presented to the panel, and the third consulted in the event of disagreement.

Sec. 106. Program Startup.

Interim Regulations. Within 90 days of enactment, the Administrator must promulgate interim regulations and procedures for the processing of claims and the operation of the Fund, including procedures for expediting exigent claims.

Interim Personnel. The Secretary of Labor and the Assistant Secretary of Labor for the Employment Standards Administration may make available to the Administrator on a temporary basis such personnel and other resources as may be necessary to facilitate the expeditious startup of the program. The Administrator may also contract with individuals and entities having relevant experience with the review of workers' compensation, occupational disease, or similar claims and financial matters relevant to the operation of the program to assist in the expeditious startup of the program.

Exigent Health Claims. The Administrator must develop procedures, including the adoption of interim regulations, pending promulgation of final regulations, for an expedited process to categorize, evaluate and pay exigent health claims. A claim will qualify for treatment as an exigent health claim if the claimant is living and the claimant provides documentation that a physician has diagnosed the claimant as having mesothelioma or a declaration or affidavit from a physician who has examined the claimant within 120 days before the date of the declaration or affidavit that the physician has diagnosed the claimant as being terminally ill from an asbestos-related disease with a life expectancy of less than a year. The Administrator may designate additional categories of claims that qualify as exigent health claims in final regulations.

Extreme Financial Hardship Claims. The Administrator may designate categories of claims to be handled on an expedited basis as a result of extreme financial hardship in final regulations.

Interim Administrator. Until an Administrator is appointed and confirmed, the Assistant Secretary of Labor for the Employment Standards Administration shall perform the responsibilities and have the authority conferred on the Administrator by the Act. Prior to the promulgation of final regulations relating to claims processing, the Interim Administrator may prioritize claims processing based on the severity of illness and likelihood that the illness was caused by exposure to asbestos without regard to time requirements prescribed in the Act.

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Sec. 107. Authority of the Administrator.

The Administrator, on any matter within the jurisdiction under this Act, may issue subpoenas for and compel the attendance of witnesses within a 100 mile radius, administer oaths, examine witnesses, and require the production of books, papers, documents and other evidence.

Subtitle B. Asbestos Disease Compensation Procedures

Sec. 111. Essential Elements of Eligible Claim.

Claimants must timely file a claim with the Fund and prove by a preponderance of the evidence that they have an eligible disease or condition as demonstrated by evidence that meets the requirements established in the claims procedures.

Sec. 112. General Rule Concerning No-Fault Compensation.

It is the intent of the FAIR Act to provide a process to compensate victims faster and with more certainty than the current system. The FAIR Act, therefore, removes the burden that a claimant would ordinarily have to overcome of establishing that the injury was the fault of a particular party. Under the FAIR Act, claimants need not establish that the injury resulted from the negligence or other fault of another person.

Sec. 113. Filing of Claims.

Claimants (or the personal representative of the claimant if deceased) must file claims with the Office within 4 years from the time the claimant knew or should have known of their injury. Persons with pending claims in the tort system must file with the Office within 4 years of the date of enactment. A claim shall not be treated as pending with a bankruptcy trust solely because the claimant whose claim was previously compensated by the trust has or alleges a non-contingent right to payment of future installments of a fixed award or a contingent right to recover additional compensation from the trust on the occurrence of a future event.

Claimants who develop an additional condition or disease may file for additional benefits. Any compensation received for a prior condition shall be deducted as a setoff against the amounts payable for the later condition. However, any compensation received for a prior non-malignant condition filed against the Fund will not be deducted as a setoff against amount payable for a later malignant condition, unless the claimant knew or should have known of the malignancy prior to receiving compensation for the non-malignant claim.

Claimants must give detailed information about the claimant, including the employment history, asbestos exposure, medical records, tobacco use, collateral sources of compensation and any other information that the Administrator shall require by regulation. Claimants asserting nonsmoker or ex-smoker status in Malignant Level VI-IX claims must also produce evidence to support nonsmoker or ex-smoker status. If the claim is filed incomplete, the Administrator shall notify the claimant of the information necessary to complete the claim and inform the claimant of the services available through the Claimant Assistance Program to assist in the completion of the claim. The information necessary to complete the claim must be received within a year of

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notification, or the claim will be dismissed. Until such information is received, any time periods for processing the claim shall be suspended.

Sec. 114. Eligibility Determinations and Claim Awards.

The Administrator must evaluate and determine the eligibility of each claim filed against the Fund, considering factual and medical evidence presented by the claimant, medical determinations of a Physicians Panel, and the results of any investigation conducted to determine whether the claim satisfies the eligibility criteria. If the Administrator requests the submission of additional medical evidence for the purpose of determining eligibility, the cost of obtaining such evidence shall be paid by the Office. Not later than 90 days after the filing of the claim, the Administrator must provide the claimant with a proposed decision on the claim.

A claimant may seek review of the decision by making a written request for a hearing within 90 days after the date of issuance of the proposed decision. A representative of the Administrator shall conduct a hearing to review the decision in a manner as to best ascertain the rights of the claimant, including receiving such evidence as the claimant and representative deem necessary to evaluate the claim. A claimant may request a subpoena only as part of the hearing process, but it is within the discretion of the representative to grant such a request. In lieu of a hearing, a claimant may obtain a review of the written record by making a written request for such within 90 days after the date of issuance of the proposed decision.

If the time for obtaining review expires and no request has been filed or the claimant waives any objections to the proposed decision, then the Administrator shall issue a final decision. If the final decision materially differs from the proposed decision, then the claimant is entitled to review of the final decision. If the claimant requests a review of the proposed decision, then the Administrator shall issue a final decision not later than 180 days after the request for review by hearing is received, or not later than 90 days after the request for review on the written record is received.

A claimant may authorize an attorney or other individual to represent him in any proceeding under this Act.

Sec. 115. Medical Evidence and Auditing Procedures.

The Administrator will establish audit procedures for medical evidence submitted as part of claims to ensure accuracy of x-ray readings and pulmonary function tests. If the Administrator finds certain providers are not complying with prevailing medical practices, records from such providers will be deemed inadmissible for a claim. A provider who is deemed non-compliant may appeal such determination under procedures established by the Administrator.

The Administrator shall establish procedures to randomly evaluate x-rays submitted in support of claims by independent certified B readers. If that evaluation disagrees with the grading assigned to the x-ray in support of the claim, the Administrator shall require review of the x-ray by a second independent certified B reader. The cost of the evaluations shall be paid by the Office. The Administrator must take the findings of the two independent B readers in making a determination of the claim if neither agrees with the grading assigned to the x-ray in support of the claim.

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To determine smoking status for claims within Malignant Level VI-IX, the Administrator shall have the authority to obtain records of past medical treatment and evaluation, affidavits of appropriate individuals, applications for insurance and supporting materials, and employer records of medical examinations. The Administrator may also require the performance of blood tests or other appropriate medical tests, the cost of which will be paid by the Office.

Subtitle C. Medical Criteria

Sec. 121. Medical Criteria Requirements.

This section establishes the latency, diagnostic, exposure and medical criteria required to establish an asbestos claim for each of 10 disease levels. Levels I through V include nonmalignant asbestos-related disease or conditions and levels VI through X include malignant diseases.

Latency: Although the latency period for asbestos-related disease can be as long as 30-40 years, part of the consensus agreement by the Committee was to require only a 10-year latency period in order to ensure that all potential asbestos victims were being compensated. Claimants must provide a statement from a doctor or a history of exposure that shows at least 10 years elapsed from the date of the initial exposure to the date of the initial diagnosis of any asbestos-related injury.

Diagnostic Criteria: This section recognizes that a medical diagnosis is a key component of the eligibility requirements in order to maintain the integrity of the Fund and to fulfill the purpose of the Act to compensate asbestos victims. This section sets forth diagnostic criteria that track the typical elements of a medical diagnosis, such as an in-person physical examination by the claimant's doctor, a thorough review of the claimant's medical, smoking and exposure history by the claimant's doctor, and a review of other potential causes of the claimant's illness.¹ Injuries due to other causes, such as smoking, can present themselves in similar ways as asbestos-related injuries. This Fund, however, is intended to compensate injuries caused by asbestos exposure, and, therefore, a diagnosis of an asbestos-related injury is required under the Act.

For levels I through V, a diagnosis must be based on an in-person physical examination by the claimant's doctor providing the diagnosis, an evaluation of smoking history and exposure history before making a diagnosis, an x-ray reading by a certified B-reader, and a pulmonary function test for levels III through V. Deceased claimants may provide a diagnosis supported by physician report based on pathological evidence or an x-ray reading by a certified B-reader. For disease levels VI through X, the diagnosis must be based on a physical examination or on findings by a board-certified pathologist.

Exposure Criteria: A claimant must demonstrate meaningful and credible evidence of exposure to asbestos in the United States, or while a U.S. citizen employed

¹ See, e.g., *The Diagnosis of Nonmalignant Disease Related to Asbestos*, Official Statement of the American Thoracic Society, March 1986 (noting that "[a]ll alternative diagnoses must be considered before accepting the presumptive diagnosis of asbestosis").

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by a U.S. company or employed on a U.S. flagged ship. There must be a causal link between the asbestos exposure related to the employment overseas for a U.S. company or on the U.S. flagged ship and the asbestos-related injury. Since asbestos fibers are present in the ambient air and water in very small amounts it is the intent of the committee that any exposure must be in excess of the amount of asbestos in the ambient air.

“Take-Home” Exposure: Claimants may alternatively satisfy the requirements under the Act based on exposures to asbestos brought into the home by an occupationally exposed person, i.e., take home exposures, if the occupationally exposed person can satisfy the exposure requirements of the disease or condition claimed and the claimant lived with the occupationally exposed person during the required exposure period. This requirement of “living with” a person requires that the claimant have used the residence of the occupationally-exposed person as his/her regular residence for the time period necessary to satisfy the exposure requirement for the disease level that the claimant is asserting. It is understood that household members may travel to a certain extent for work or vacation and still be considered as “living with” another member of the household. Because take home exposures generally do not rise to the same level and intensity of exposure as the occupationally exposed worker, such claims will be referred to a Physicians Panel for a determination as to whether the take home exposures are sufficient to establish a causal relationship to the claimed disease comparable to that of the occupational exposed person.

Libby, Montana: In addition, the unique nature of the exposures to asbestos associated with the vermiculite mining and milling operations in Libby, Montana have resulted in a number of asbestos-related injuries among the residents of Libby. Under the FAIR Act, the occupational exposure requirements are waived for workers in the mining and milling operations in Libby, Montana, and persons who lived or worked within a 20-mile radius of Libby, Montana for at least 12 consecutive months prior to December 31, 2003. The mining and milling operations in Libby ended in 1990, and the United States Environmental Protection Agency, among others, has been working to address and eliminate the environmental and health risks in Libby since 1999.

Non-malignant Conditions: For nonmalignant conditions (Levels I to V), the medical criteria generally require a diagnosis of bilateral pleural plaques or thickening, bilateral pleural calcification, diffuse pleural thickening, bilateral pleural disease of grade B2, or asbestosis based on x-ray readings or pathology. Level II includes claimants with mixed obstructive and restrictive disease based on pulmonary function testing and supporting medical documentation that asbestos exposure was a contributing factor to the disease. Mild, moderate and severe impairment is required for Levels III, IV, and V, respectively, based on pulmonary function test results and supporting medical documentation that there are no other more likely causes of the claimant’s impairment than the claimant’s asbestos exposure. The Committee intends that such medical documentation would be provided by a physician with knowledge and expertise in diagnosing occupational lung disease. With respect to Nonmalignant Levels III, IV, and V the Committee intends to the extent feasible that the documentation would be provided by an appropriately board certified physician in occupational medicine or pulmonary

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medicine. The Committee recognizes, however, that access to appropriately board-certified physicians may not be feasible for all claimants due to geographical constraints. The exclusion of other more likely causes of the impairment is a typical component of a medical diagnosis due to the fact that there are a number of other potential causes for such conditions which may have similar characteristics of an asbestos-related condition. For example, individuals exposed to other dusts or airborne contaminants may be at risk for silicosis or other diseases which also may show up as an abnormality in the lung.

In addition, Level I requires 5 years cumulative occupational exposure, while levels II through V require 5 years substantial occupational exposure weighted based on time and industry (“weighted years”). Because it is well recognized in the medical community that, except for mesothelioma, asbestos-related diseases are dose dependent, i.e., the risk increases as the amount of exposure increases, the industry and time weighting of years of exposure are necessary to act as a measure of dose. Certain industries and occupations involve higher levels of exposures to asbestos fibers due to the direct handling of the asbestos itself, and is reflected in the industry weighing component. On the other hand, persons who work with asbestos-containing products, such as auto mechanics who work on brakes and related occupations, are generally not exposed to asbestos fibers in harmful amounts in the course of their occupation. Such occupations do not involve the same type of exposure as a person who manufactured products using raw asbestos.

The intent of the weighted exposure requirement is to recognize that federal regulations implemented in the 1970’s and 1980’s have dramatically reduced asbestos exposures and resulted in significantly less exposures to asbestos that simply do not compare to the levels of asbestos exposures that occurred prior to 1970. As found by the District Courts, “Mesothelioma and asbestos-related lung cancers are expected to result primarily from the sort of direct occupational exposure that was phased out as a result of increasingly stringent federal regulation.”² Also, as noted by the American Thoracic Society in its March 1986 guidance, “[w]ith exposures below the current recommended permissible exposure limit value [under OSHA standards], asbestosis is not likely to be found during the course of a working career. With proper engineering controls, work practice, and where necessary, personal respiratory protective devices, asbestosis should not occur.”³ These differences in the exposure intensity and amount of exposure to asbestos fibers are reflected in the industry and time-weighting formula.

Malignant Conditions: For malignant conditions (Levels VI to X), the medical criteria require a diagnosis of mesothelioma, primary lung cancer, or other cancer. For *other cancers*, level VI, requirements of a claim include (i) evidence of a bilateral asbestos-related nonmalignant disease; (ii) 15 weighted years of exposure to asbestos; and (iii) supporting medical documentation that the claimant’s exposure to asbestos was a contributing factor in causing the claimant’s other cancer. These claims are referred to a Physicians Panel for a determination that the claimant’s asbestos exposure was a substantial contributing factor in causing the claimant’s other cancer. The intent behind

² *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F.Supp.2d 297, 311 (E.&S.D.N.Y. 2002)(citations omitted).

³ *The Diagnosis of Nonmalignant Disease Related to Asbestos*, Official Statement of the American Thoracic Society, March 1986.

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this provision is to reflect the testimony before this Committee, which indicated that a majority of the medical community has found little association between asbestos exposure and other cancers, particularly colorectal cancer. Because there is some evidence that may support an association, the Committee has provided compensation for such cancers. Because of the evidence finding no association, however, the Committee believes it is reasonable to require that a claimant establish a causal connection between his/her asbestos exposure and his/her other cancer. The Committee may review any studies, including the Institute of Medicine study to be commissioned, in making this determination.

Lung Cancer: The testimony before this Committee indicated that the majority of the medical community has found that lung cancer is generally not related to asbestos exposure unless the claimant has underlying asbestosis or, at least, sufficient exposure to asbestos to have caused asbestosis.⁴ The United States Supreme Court recognized that “studies provide strong support for the notion that asbestosis is crucial to the development of asbestos-associated lung cancers.”⁵ Workers with only pleural plaques, on the other hand, have not been shown to be at a higher risk for lung cancer, although pleural plaques are considered a marker of prior exposure to asbestos.⁶ The consensus medical criteria established under this section thus provides three levels of lung cancers, with increasing evidence of causation.

For *lung cancer I*, level VII, evidence of 15 weighted years of exposure to asbestos is required. For *lung cancer II*, level VIII, the requirements include (i) evidence of bilateral pleural plaques, bilateral pleural thickening or bilateral pleural calcification, and (ii) 12 weighted years of exposure to asbestos. For *lung cancer III*, level IX, the claimant must provide either (i) a diagnosis of asbestosis and evidence of 8 or 10 weighted years, depending on the x-ray reading, or (ii) diagnosis of asbestosis by pathology and evidence of 10 weighted years. Supporting medical documentation as used throughout this section refers to a medical diagnosis or opinion related to the claimant’s condition and does not include general medical literature related to the claimed disease or condition.

All lung cancer claims are paid pursuant to a matrix of classes for each level which the Administrator develops. This matrix is based on the claimant’s smoking history, their age, and the intensity and duration of the exposure. A former smoker is defined as a person who quit smoking at least 12 years prior to date of diagnosis. A nonsmoker is a person who has never smoked at any time during his or her life. Because of the potential for misrepresentations related to one’s smoking behavior, the claimant bears the burden of producing meaningful and credible evidence of their smoking history as part of their claim submission.

⁴ Testimony of Dr. James D. Crapo, Professor of Medicine, National Jewish Center and University of Colorado Health Sciences Center, Before the Senate Committee on the Judiciary Concerning S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, June 4, 2003, at 6.

⁵ *Norfolk & W. Railway Co. v. Ayers*, 123 S. Ct. 1210, 1222 (2003) (citing A. Churg & F. Green, *Pathology of Occupational Lung Disease* 343 (2d ed. 1998)).

⁶ Testimony of Laura Welch, MD, Medical Director, Center to Protect Workers Rights, On Asbestos Related Diseases – Medical Criteria, Populations at Risk and Disease Projections, Before the Senate Judiciary Committee, June 4, 2003, at 7.

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The intent behind paying less money to smokers is to reflect the fact that smoking also plays an important factor in causing lung cancers. According to the American Lung Association, about 87% of lung cancer cases are caused by smoking.⁷ Early studies showing a synergistic effect between smoking and asbestos exposure have not been substantiated by later studies. Studies have also shown that the risk of lung cancer, while diminished for those who quit smoking, never reaches the same levels as those for lifetime nonsmokers.⁸ This is particularly true where the claimant smoked 40-50 packs of cigarettes a year for many years prior to quitting. The Fund is not intended to be a compensation system for smokers, which would otherwise overwhelm the Fund leaving no money for asbestos victims.

For *mesothelioma*, level X, the claimant must provide credible evidence of identifiable exposure to asbestos based on occupational exposures, take home exposures, or exposures from living in the proximate vicinity of a plant or other industrial operation that has emitted asbestos fibers into the air resulting in asbestos being present in the environment well above normal background levels. Claimants may allege any other specific, identifiable exposure to asbestos as the cause of the mesothelioma, but such cases shall be referred to a Physicians Panel for a determination as to eligibility. This identifiable exposure is not intended to include mere exposure to asbestos insulation in homes, except in the unusual circumstance that the claimant was exposed to friable asbestos in large amounts or on a repeated basis, in which case the claim shall be subject to review by a Physicians Panel.

Study of “other cancers” and causation: No later than 2 years after the date of enactment, the Institute of Medicine of the National Academy of Sciences must complete a study of the causal link between asbestos exposure and the other cancers: colorectal, laryngeal, esophageal, pharyngeal and stomach cancers. The study must be transmitted to Congress, the Administrator, the Advisory Committee or the Medical Advisory Committee and the Physicians Panels. The Administrator and the Physicians Panels may consider the results of the report for purposes of determining whether asbestos exposure is a substantial contributing factor to causing claimant’s other cancer. The Administrator also may request additional study regarding other cancers if warranted by advancements of science.

Exceptional Medical Claims: The FAIR Act recognizes that in some cases, through no fault of the claimant, claimants may not have certain medical tests that are required under the medical criteria, but may have results from comparable tests and that there may be advances in science that result in new testing methods not anticipated by the Committee at this time. As such, this provision allows a claimant to seek designation of

⁷ ALA, *Facts About Lung Cancer*, available at www.lungusa.org/diseases/lungcanc.html. Radon is considered to be the second leading cause of lung cancer in the United States today. *Id.*

⁸ See, e.g., Donald R. Shopland, et al., *Smoking- Attributable Cancer Mortality in 1991: Is Lung Cancer Now the Leading Cause of Death Among Smokers in the United States?*, 83 J. of the Cancer Inst. 1142, 1145 (1991); National Cancer Institute, SEER Statistics, *Effect of Quitting Smoking on Lung Cancer Risk Among Male and Female Former Smokers, by Length of Time Off Cigarettes and Number of Cigarettes Smoked Daily*, (Table 3, based on data in Shopland et al., 1991), available at <http://seer.cancer.gov/publications/raterisk/risks71.html>.

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his or her claim as an exceptional medical claim if the claimant states that claim does not meet medical criteria requirements or has been found ineligible for compensation based on the failure to meet the medical criteria only. The claimant must provide a report from a physician meeting the requirements of this section, such as a diagnosis based on an in person physical examination that finds asbestos exposure as a contributing factor to causing the relevant disease, and which includes (i) a complete review of the claimant's medical history and current condition, (ii) additional material as required by the Administrator, and (iii) a detailed explanation as to why the claim meets the standard for designating exceptional medical claims.

All applications for designation as an exceptional medical claim are referred to a Physicians Panel, which must find that the claimant, for reasons beyond his or her control, cannot meet the requirements but can through comparably reliable evidence establish a condition similar to one that would satisfy the requirements. A Physicians Panel may request additional reasonable testing, and CT Scans may be submitted in addition to an x-ray. CT Scans are generally used only after an x-ray has already been taken and the physician believes a CT Scan may shed additional light on the claimant's condition. In such cases, a CT Scan may be used to supplement the submission of an x-ray reading. Because of the lack of any clear, objective standards similar to those for x-ray readings, however, the Committee does not intend that CT Scans become normal practice for the filing of claims, and as such, they are limited to optional use by a Physicians Panel in assessing exceptional medical claims.

If a Physicians Panel certifies a claim as an exceptional medical claim, it must designate the disease category for which compensation may be sought and refer the claim to a special asbestos master for a determination on eligibility on the remaining diagnostic, latency and exposure requirements. A claimant may resubmit application based on new evidence, stating the new evidence that is the basis of the resubmission. The Administrator will promulgate rules governing the procedures for seeking designation of a claim as an exceptional medical claim. Because the medical conditions of the residents of Libby, Montana are currently being studied by various agencies, claims filed by Libby, Montana claimants are to be automatically designated as exceptional medical claims and referred a Physicians Panel for review of the claimant's eligibility.

Subtitle D. Awards

Sec. 131. Amount.

Because there are other causes for many of the illnesses that are compensated under the Act, claims values have been carefully constructed providing increased compensation not only for more severe degrees of illness, but also in those cases where there is increased confidence that the asbestos exposure was the cause of the claimant's injury. Mesothelioma, where asbestos is currently considered the only known cause, and lung cancer claims where the claimant has been diagnosed with underlying asbestosis and is a nonsmoker, have been given the highest values. Claims value for claimants with severe asbestosis and other lung cancer claims where the causal connection between the asbestos exposure and the injury is more substantiated similarly reflect the purpose of the Act to direct monies to the most seriously injured claimants whose injuries were caused by exposure to asbestos.

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With this purpose in mind, eligible claims will be paid as follows:

	<u>Disease / Condition</u>	<u>Amount of award[†]</u>
Level I	Asbestosis/Pleural Disease A	Medical Monitoring*
Level II	“Mixed” Disease	\$20,000
Level III	Asbestosis/Pleural Disease B	\$85,000
Level IV	Severe Asbestosis	\$400,000
Level V	Disabling Asbestosis	\$850,000
Level VI	Other Cancers	\$150,000
Level VII	Lung Cancer I	
	Smokers	\$25,000 - \$75,000**
	Former Smokers	\$75,000 - \$225,000**
	Nonsmokers	\$225,000 - \$600,000**
Level VIII	Lung Cancer II	
	Smokers	\$150,000 - \$250,000**
	Former Smokers	\$400,000 - \$600,000**
	Nonsmokers	\$600,000 - 1,000,000**
Level IX	Lung Cancer III	
	Smokers	\$450,000 - \$550,000**
	Former Smokers	\$650,000 - \$950,000**
	Nonsmokers	\$800,000 - \$1,000,000**
Level X	Mesothelioma	\$1,000,000

[†] Scheduled awards will be indexed for future inflation based on a cost of living adjustment.

* Claimants meeting Level I requirements are eligible for medical monitoring reimbursement only.

** All Lung Cancer values are to be determined based on a matrix which the Administrator must develop. This matrix will reflect different values based on a claimant’s smoking history, age and level and duration of exposure. An “ex-smoker” is someone who has not smoked in the 12-year period before diagnosis of lung cancer. A “non-smoker” is a claimant who has never smoked. There are some occupations, such as automotive repair, in which a claimant would meet the definition of “substantial occupational exposure,” “moderate exposure,” and “heavy exposure” because he or she was working with a product containing asbestos for a sufficient period of time—yet, because of the low level of asbestos fibers to which the claimant would be exposed during this period, the exposure would not in reality be substantial and would not be capable of causing an asbestos-related disease. The bill therefore requires the Administrator to make a determination, based on studies of industrial hygiene and epidemiology, of the industries and occupations in which the airborne fiber levels of asbestos would indeed be at a level where exposure is considered substantial. Claimants whose primary occupation falls outside those industries or occupations where exposure has been determined to be substantial should not be presumed to have met the exposure requirements but such claims may be evaluated by a Physicians Panel as exceptional medical claims.

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Sec. 132. Medical Monitoring.

Although the intention of the FAIR Act is to direct monies away from the unimpaired and to those truly sick from asbestos exposure, the Committee recognizes that claimants with significant occupational exposure to asbestos may be at risk of developing a serious asbestos-related illness in the future. As such, claimants meeting the criteria for Level I will be reimbursed for all reasonable costs (which are not covered by insurance) for x-rays, physical examinations, and pulmonary function tests every three years, which will provide the claimant with information as to whether he or she has a compensable illness. Although the claimant may choose which physician conducts such tests, the Administrator will provide eligible claimants with a list of providers in the claimant's area that can provide such services. Filing a claim for reimbursement of medical monitoring costs shall not commence the 4 year statute of limitations for filing a claim for compensation for an eligible condition or disease.

Sec. 133. Payment.

Payments should be disbursed over a period of 3 years and in no event more than 4 years from the date of final adjudication of the claim, and can be accelerated for mesothelioma claimants who are alive on the date of determination. There shall be a presumption that any award shall provide for the payment of forty (40%) percent in year 1, thirty (30%) percent in year 2, and thirty (30%) percent of the total amount in year 3. The Administrator shall develop guidelines to provide for the extension of the payment period to 4 years if required to preserve the overall solvency of the Fund. However, in no event shall less than fifty (50%) percent of the award be paid in the first 2 years of the payment period. Claimants may also elect to receive their benefits in the form of an annuity. All benefits are non-taxable and not deemed to be a Medicare benefit.

Sec. 134. Reduction in Benefit Payments for Collateral Sources.

All awards will be reduced by the amount of collateral source a claimant has received, or is entitled to receive. Collateral source is defined as compensation that the claimant received or is entitled to receive from a defendant or its insurer, or compensation trust as a result of judgment or settlement for an asbestos related injury that is the subject of a claim filed under section 110. Worker's compensation and veteran's benefits are not included as collateral sources.

TITLE II. ASBESTOS INJURY CLAIMS RESOLUTION FUND

Subtitle A. Asbestos Defendants Funding Allocation

Sec. 201. Definitions.

Sec. 202. Authority and Tiers.

Defendant participants are liable for payments not to exceed \$ 57.5 billion over the life of the Fund, subject only to the contingent call for additional payments from years 24-27 of the Fund. Payments are to be made in accordance with a schedule of payments

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structured around a tiering system based on historical expenditures on asbestos claims, including costs related to defense and indemnity, and further subdivided based on revenues.⁹ This section gives the Administrator authority to determine the amount that each defendant participant is required to pay into the fund to compensate claimants for asbestos injuries in the following manner:

Tier I – This tier accounts for those defendant participants faced with pending bankruptcy proceedings at the time of enactment. Tier I includes all “debtors” that, together with all of their direct or indirect majority-owned subsidiaries, have prior asbestos expenditures greater than \$ 1 million. Debtor is defined in Sec. 201 as persons that have a case pending under a chapter of title 11 of the United States Code on the date of enactment of the FAIR Act or at any time during the 1-year period immediately preceding that date, irrespective of whether the debtor’s case under that title has been dismissed. Debtors who can show that their bankruptcy was not caused by asbestos liability may continue with reorganization subject to bankruptcy court approval.

Other Tiers – Persons or affiliated groups are assigned to Tiers II, III, IV, V, VI or VII according to their prior asbestos expenditures as follows:

Tier II: \$ 75 million or greater.

Tier III: \$ 50 million or greater, but less than \$ 75 million.

Tier IV: \$ 10 million or greater, but less than \$ 50 million.

Tier V: \$ 5 million or greater, but less than \$ 10 million.

Tier VI: \$ 1 million or greater, but less than \$ 5 million.

Tier VII: \$ 5 million or more in FELA liability. (Note: Tier VII is discussed in Sec. 203.)

Once assigned, a defendant participant will remain in the tier and the subtier for the life of the Fund, regardless of subsequent events, unless the Administrator finds sufficient evidence to conclude that inclusion within a tier was inaccurate.

Superseding Provisions: To ensure finality, the FAIR Act supersedes all of the following: the treatment of an asbestos claim in a plan of reorganization with respect to a debtor included in Tier I; an asbestos claim against any debtor in Tier I; and any agreement, understanding, or undertaking by a debtor or third party with respect to the treatment of an asbestos claim filed in a debtor’s bankruptcy case. A plan of reorganization, agreement, understanding, or undertaking by a debtor or third party is of no force or effect, to the extent it relates to an asbestos claim, and no person can hold any right or claim with respect to such agreements.

Sec. 203. Subtiers.

⁹ It is the intent of the Committee that the amounts contributed by defendants and insurers be tax deductible and that claim awards and the growth of the Asbestos Claims Resolution Fund be tax - free, consistent with good public policy. The Judiciary Committee and Finance Committee have worked together to insert the appropriate language during floor consideration of this bill.

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After assigning defendant participants to tiers, the Administrator is then directed to assign these companies to subtiers according to the following schedule:

Tier I – Each debtor in Tier I is assigned to one of three subtiers and must contribute to the Fund according to the following schedule that accounts for the debtor's operating capacity:

Subtier 1: Operational companies – 1.5184% of the debtor's 2002 revenues. The Administrator may allow a Subtier 1 debtor to meet its payment obligation with assets other than cash if the Administrator determines that requiring an all cash payment would render the debtor's reorganization infeasible. If a person who is subject to a case pending under a chapter of title 11, United States Code, does not meet its payment obligation when due, the Administrator is authorized to seek payment of all or any portion of the amount due from any direct or indirect majority-owned subsidiaries.

Subtier 2: Non-operational companies – Assets earmarked for the settlement of asbestos claims must be assigned to the Fund no later than 90 days after the date of enactment.

Subtier 3: Non-operational companies with no assets earmarked for the settlement of asbestos claims – 50% of all unencumbered assets shall be contributed to the Fund no later than 90 days after the date of enactment. Unencumbered assets shall be calculated as the total assets, excluding insurance related assets, less all allowable administrative expenses, allowable priority claims under section 507 of title 11, United States Code, and allowable secured claims.

Class Action Trust: The assets of any class action trust established for the settlement of asbestos claims of any Tier I debtor shall be transferred to the Fund no later than 6 months after that date of enactment.

Tier II – A person or affiliated group in Tier II are assigned to subtiers according to their revenues and are liable for making annual payments to the Fund as follows:

Subtier 1: \$ 25 million (highest revenues).

Subtier 2: \$ 22.5 million (next highest revenues).

Subtier 3: \$ 20 million (remaining).

Subtier 4: \$ 17.5 million (next to the lowest revenues).

Subtier 5: \$ 15 million (lowest revenues).

Each subtier must contain as close to an equal number of the total defendant participants as possible.

Tier III – A person or affiliated group in Tier III are assigned to subtiers according to their revenues and are liable for making annual payments to the Fund as follows:

Subtier 1: \$ 15 million (highest revenues).

Subtier 2: \$ 12.5 million (next highest revenues).

Subtier 3: \$ 10 million (remaining).

Subtier 4: \$ 7.5 million (next to the lowest revenues).

Subtier 5: \$ 5 million (lowest revenues).

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Each subtier must contain as close to an equal number of the total defendant participants as possible.

Tier IV – A person or affiliated group in Tier IV are assigned to subtiers according to their revenues and are liable for making annual payments to the Fund as follows:

Subtier 1: \$ 3.5 million (highest revenues).

Subtier 2: \$ 2.25 million (next highest revenues).

Subtier 3: \$ 1.5 million (remaining).

Subtier 4: \$ 500,000 (lowest revenues).

Each subtier must contain as close to an equal number of the total defendant participants as possible.

Tier V – A person or affiliated group in Tier V are assigned to subtiers according to their revenues and are liable for making annual payments to the Fund as follows:

Subtier 1: \$ 1 million (highest revenues).

Subtier 2: \$ 500,000 (remaining).

Subtier 3: \$ 300,000 (lowest revenues).

Each subtier must contain as close to an equal number of the total defendant participants as possible.

Tier VI – A person or affiliated group in Tier VI are assigned to subtiers according to their revenues and are liable for making annual payments to the Fund as follows:

Subtier 1: \$ 500,000 (highest revenues).

Subtier 2: \$ 250,000 (remaining).

Subtier 3: \$ 100,000 (lowest revenues).

Each subtier must contain as close to an equal number of the total defendant participants as possible.

Tier VII – In addition to an assignment in Tiers II through VI, a person or affiliated group shall also be included in Tier VII if it is, or has at any time been subject to, asbestos claims under the Federal Employers Liability Act (“FELA”) and has paid not less than \$ 5 million in costs relating to such claims. Such persons or affiliated groups shall pay, in addition to their other tiered payment obligations and on an annual basis:

Subtier 1: \$ 10 million (Railroad or common carriers with revenues of \$ 5 billion or more).

Subtier 2: \$ 5 million (Railroad or common carriers with revenues of less than \$ 5 billion, but more than \$ 3 billion).

Subtier 3: \$ 500,000 (Railroad or common carriers with revenues of less than \$ 3 billion, but more than \$ 0.5 billion).

Revenues: Revenues are determined by reported earnings for the year ending December 31, 2002, or if applicable, the earlier fiscal year that ends during 2002. Any portion of revenues of a defendant participant that is derived from insurance premiums shall not be used to calculate the payment obligation.

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Sec. 204. Assessment Administration.

Subject to the contingent call, each defendant participant is liable to pay into the Fund the amounts provided by the tiering system until either the defendant participant has satisfied its obligations during the first 23 annual payment cycles of the Fund or if the Fund receives \$ 57.5 billion from the defendant participants, excluding any amount rebated.

Small Business Exception: Persons or affiliated groups meeting the definition of “small business” as defined by the Small Business Administration pursuant to the Small Business Act, 15 U.S.C. § 632, on December 31, 2002, are exempt from any payment requirement and are not be included in the subtier allocations.

Adjustments: Under expedited procedures established by the Administrator, a defendant participant may seek an adjustment of the amount of its payment obligations, either in the form of forgiveness of a portion of the payment or a rebate, based on severe financial hardship or demonstrated inequity. The decision of the Administrator of whether to grant the adjustment and the size of such an adjustment is subject to judicial review pursuant to section 303.

Hardship Adjustments – A defendant participant may apply for an adjustment during any period in which a payment obligation to the Fund remains outstanding and must demonstrate that the amount of the payment obligation would constitute a severe financial hardship.

Inequity Adjustments – A defendant participant may also qualify for an adjustment by demonstrating that the amount of its payment obligation is exceptionally inequitable: (1) when measured against the amount of the likely cost of its future liability in the tort system in the absence of the Fund, (2) when compared to the payment rate for all defendant participant in the same tier, or (3) when measured against the percentage of prior asbestos expenditures that were incurred with respect to claims that neither resulted in an adverse judgment nor the subject of a settlement that required a payment to a plaintiff. Additionally, a defendant participant can qualify for a two-tier main tier and a two-tier sub –tier adjustment reducing the payment obligation by demonstrating that not less than 95% of such person’s prior asbestos expenditures arose from claims related to the manufacture and sale of railroad related products, so long as the sale of such products is temporally and casually remote.

Term and Renewal – Both hardship and inequity adjustments granted shall have a term of 3 years that may be renewed upon a demonstration of continuing qualification.

Reinstatement Authority – Following expiration of the hardship or inequity adjustment period granted under this section, the Administrator shall annually determine whether there has been a material change in the financial condition of the defendant participant such that the Administrator may reinstate part or all of the defendant participant’s payment obligation that was not paid during the adjustment term.

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Limitation of Adjustments – The aggregate total of financial hardship and inequity adjustments in any given year shall not exceed \$ 250 million, except to the extent additional monies are available for adjustments as a result of carryover of prior years' funds or made available under the Defendant Guaranteed Payment Account.

Advisory Panels – The Administrator shall appoint a Financial Hardship Adjustment Panel and an Inequity Adjustment Panel to advise the Administrator in granting adjustments.

Several Liability: Each defendant participant's payment obligation to the Fund is several. There is no joint liability and the future solvency of any defendant participant shall not affect the assessment assigned to any other defendant participant.

Consolidation of Payments: To determine the payment obligations of defendant participants, any affiliated group may elect to report on a consolidated basis. If an affiliated group elects consolidation, the group can be treated as if it were a single participant, with the ultimate parent of the group solely liable, as between the Administrator and the affiliated group, for the payment of the annual amount.

Determination of Prior Asbestos Expenditures: Payments by indemnitors prior to December 31, 2002, shall count as part of the indemnitor's prior asbestos expenditures.

Minimum Annual Payments: Except as provided by the contingent call, the aggregate annual payments of the defendant participants to the Fund shall be at least \$ 2.5 billion each year for the first 23 years of the Fund. To the extent payments fail in any year to meet the minimum \$2.5 billion annual payment obligation, net of any hardship or inequity adjustments, the balance shall be obtained from the defendant guaranteed payment account. But to the extent that the guaranteed payment account is insufficient to meet the minimum net, the Administrator may assess a guaranteed payment surcharge against defendant participants to recover the \$2.5 billion, net of any hardship or inequity adjustments. This subsection, when read in conjunction with subsections (j), (k), and (l), establishes a funding guarantee ensuring that defendant participants will pay \$2.5 billion after financial hardship and inequity adjustments – adjustments that the Administrator is authorized to make up to \$250 million per year (subject to an additional \$50 million from excess funding and additional amounts carried over from previous years).

Procedures for Making Payments:

Initial Year: Tier I – Not later than 90 days after the date of enactment, each debtor is required to file with the Administrator a statement identifying the bankruptcy cases associated with the debtor, a statement of whether its prior asbestos expenditures exceed \$ 1 million, and a statement of whether the debtor is operational and holds any assets. Additionally, debtors falling within the subtiers must file as follows: those within subtier 1 shall file a statement of the 2002 revenues, those within subtier 2 shall assign its assets to the Fund, and those within subtier 3 shall include with their payment a statement of how such a payment was calculated.

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Initial Year: Tiers II-VI – Not later than 180 days after the date of enactment, each participant included within Tiers II through VI shall file with the Administrator a statement of whether it elects to report on a consolidated basis, a good faith estimate of prior asbestos expenditures, a statement of 2002 revenues, and payment in the amount specified for the lowest subtier of the tier within which the defendant participant falls.

Relief: The Administrator shall establish procedures to grant defendant participants relief from its initial payment obligation where the participant shows that it is likely to qualify for a financial hardship adjustment and failure to provide relief would cause severe irrevocable harm.

Initial Year: Tier VII – Not later than 90 days after the date of enactment, each defendant participant shall file with the Administrator a good faith estimate of all asbestos-related FELA payments, a statement of revenues, and payment in the amount specified by the subtier.

Notice: Not later than 240 days after the date of enactment, the Administrator must notify all reasonably identifiable defendant participants of the requirement to submit information necessary to calculate the amount of any required contribution to the Fund; and publish in the Federal Register a notice requiring any person who may be a defendant participant to submit such information. Within 30 days of receiving this initial notice, the defendant participant must provide the Administrator with the required information.

Initial Determination – Not later than 60 days after receiving a response from the defendant participant, the Administrator shall send an notice of initial determination identifying the tier and subtier into which the participant falls and the annual payment obligation.

Payments – Within 30 days of receiving a notice of initial determination, the defendant participant shall pay the Administrator the amount required.

Rehearing – A defendant participant seeking a rehearing of the Administrator's inclusion of the participant within a given tier and/or subtier must file such a request within 30 days of receipt of notice of the Administrator's determination.

New Information: The Administrator is authorized to adopt procedures for requiring the payment of additional amounts, or refunding amounts already paid, based on new information received. Additionally, if the Administrator received information that an additional person may qualify as a defendant participant, the Administrator shall require such person to submit information necessary to determine whether the person is required to make payments.

Defendant Hardship and Inequity Adjustment Account: To the extent the total payments by the defendant participants in any given year exceed the minimum aggregate payments, excess monies up to \$ 250 million shall be placed in a defendant hardship and inequity adjustment account established within the Fund by the Administrator.

Use of Funds – The money in the account shall be administered like the remainder of the Fund but shall be reserved and may be used only to make up for

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any relief granted for severe financial hardship or demonstrated inequity or to reimburse defendant participants granted relief after payment.

Carryover of Unused Funds – Any unused funds in a given year in the account shall be carried over for adjustments in subsequent years.

Defendant Guaranteed Payment Account: In the event there are excess monies, such monies shall be used to provide additional adjustments up to a maximum aggregate of \$ 50 million and shall be placed in a defendant guaranteed payment account established within the Fund.

Guaranteed Payment Surcharge: This section authorizes the Administrator to impose a guaranteed payment surcharge on all defendant participants if there are insufficient funds in the Guaranteed Payment Account to satisfy the amount of any future shortfall. Any surcharge must be imposed on a pro rata basis, in proportion to each defendant participants' relative annual liability under the funding formula if sections 202 and 203.

Contingent Call for Mandatory Additional Payments: If the Administrator has certified the necessity of additional payments, the Administrator may require the defendant participants to pay an additional \$ 10 billion to the Fund subsequent to the payment of the maximum aggregate payment obligation.

Contingent Call Certification – Prior to invoking the contingent call, the Administrator shall publish notice in the Federal Register of a proposed certification that the entire of the contingent call amount is necessary to meet the Fund's obligations, including an analysis supporting the certification. Defendant participants then have 60 days to provide the Administrator with additional information to support a determination that all or some of the additional payments set forth in the notice are not required. The Administrator shall publish a final notice in the Federal Register of all comments submitted. If the Administrator certifies the need for the contingent call, then written notice shall be provided to each defendant participant of the schedule of payments.

Subtitle B. Asbestos Insurers Commission

Sec. 210. Definition.

Sec. 211. Establishment of Asbestos Insurers Commission.

The President, with the advice and consent of the Senate, is directed to appoint 5 members to serve on the Asbestos Insurers Commission (the Commission) and shall select a Chairman from among its members. No member may be an employee, former employee, immediate family member of an employee, or shareholder of an insurer participant and may not be an officer of the Federal Government, except by reason of membership on the Commission. Any vacancy shall be filled by Presidential appointment.

Not later than 30 days after the date on which all members of the Commission have been appointed, the Commission shall hold its first meeting and shall thereafter

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meet at the call of the Chairman as necessary. No business may be conducted without a majority of the member participating.

Sec. 212. Duties of Asbestos Insurers Commission.

Determination of Insurer Payment Obligations: The total aggregate contribution of the insurer participants is \$ 46.025 billion. Not later than 120 days after the initial meeting, the Commission is required to commence a rulemaking procedure provide for the allocation of contributions among the insurers. The Commission may provide for one or more allocation formulas to be applied to all insurer participants or groups of similarly situated participants. After adopting such a rule, the Commission shall then apply that formula to determine the amount that each insurer participant shall be required to pay into the Fund. Every insurer, reinsurer and run-off entity with asbestos-related obligations in the United States is subject to the Commission's and Administrator's authority under this Act and is required to fulfill its contribution obligations without regard to whether it is licensed in the United States. Unless otherwise provided, each insurer participant is severally liable for its payment obligation to the Fund. There is no joint liability and the future insolvency of any insurer participant does not affect the assessment assigned to any other insurer participant.

Payment Criteria – Insurers that have paid or been assessed at least \$ 1 million in defense or indemnity costs by a legal judgment or settlement for asbestos-related personal injury claims shall be considered insurer participants. The Commission shall consider and weigh the following when establishing the allocation formula: historic premium for lines of insurance associated with asbestos exposure, recent loss experience for asbestos liability, reserves for asbestos liability, the likely cost of future liabilities, and any other relevant factors. The Commission may establish procedures and standards for determination of asbestos reserves of insurer participants. Insurer participants may seek adjustments by demonstrating that the set contribution poses an exceptional circumstance or severe financial hardship to the insurer participant.

Payment Schedule – The aggregate annual amounts from insurer participants is as follows:

Year 1: \$ 2.7 billion
Year 2: \$ 7.5 billion
Year 3: \$ 2.175 billion
Years 4 through 17: \$ 1.625 billion annually
Years 18 through 21: \$ 1.350 billion annually
Years 22 through 26: \$ 1.080 billion annually
Year 27: \$ 100 million

Procedure for Notifying Insurer Participants of Individual Contribution Obligations: Within 30 days after its initial meeting, the Commission is required to directly notify all reasonably identifiable insurer participants of the requirement to submit information necessary to calculate the amount of any required contribution to the Fund; and publish in the Federal Register a notice requiring any person who may be an Insurer Participant to submit such information. Insurers meeting the criteria of insurer participants must respond to such notice. The response must be signed by a responsible

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corporate officer, general partner, proprietor, or individual of similar authority, who shall certify under penalty of law the completeness and accuracy of the information submitted.

Not later than 120 days after the initial meeting of the Commission, the Commission must send each participant a notice of the initial determination assessing a contribution to the Fund. If no response is received from the participant, or if the response is incomplete, the initial determination assessing a contribution from the participant must be based on the best information available to the Commission. Not later than 30 days after receiving notice of the initial determination from the Commission, an Insurer Participant may provide the Commission with additional information to support limited adjustments to the assessment received to reflect exceptional circumstances.

The Commission may conduct examinations of the books and records of insurer participants to determine the completeness and accuracy of the information submitted for the purpose of determining required contributions. The Commission may request the Attorney General to subpoena persons to compel relevant information. Additionally, any escrow account established in connection with an asbestos trust fund that has not been judicially confirmed by the date of enactment shall be the property of and returned to the insurer participant.

Not later than 60 days after the notice of initial determination is first sent out, the Commission shall send a notice of final determination.

Insurer Participants Voluntary Allocation Agreement: Not later than 30 days after the Commission proposes a rule establishing an allocation formula, direct insurers or reinsurers may submit an allocation agreement, approved by all the participants in the applicable group, to the Commission and the Committees on the Judiciary of the Senate and the House of Representatives. The Commission shall determine whether the allocation agreement meets the requirements of the Act and certify the agreement. The authority of the Commission over the participants to the agreement shall terminate on the day of certification and the Administrator shall assume responsibility for calculating the individual contribution obligations.

Commission Report: Until the Commission is terminated, though, the Commission shall submit an annual report stating the amount that each insurer participant is required to contribute to the Fund, including the payment schedule, to the Administrator and the Committees on the Judiciary of the Senate and the House of Representatives.

Interim Payments: During the period between the date of enactment and the issuance of the final determination of contributions of the Commission, the Administrator holds authority to require insurer participants to pay interim contributions to the Fund. This provision is intended to ensure expedited funding for quicker claims processing upon establishment of the Fund. Such contributions shall be allocated among the individual insurer participants on an equitable basis determined by the Administrator and shall be credited against the ultimate contribution obligation established by the Commission. Any participant may seek an exemption under the financial hardship or exceptional circumstances standards. A decision by the Administrator to establish

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interim contribution obligations shall be considered a reviewable final agency action, but may not be stayed by the reviewing court.

Transfer of Authority from the Commission to the Administrator: Upon termination of the Commission, the Administrator shall assume the responsibilities and authority of the Commission, except that the Administrator shall not have the power to modify the established allocation formula.

Judicial Review: The Commission's established allocation formula, its final determinations of contribution obligations and other final actions shall be judicially reviewable.

Sec. 213. Powers of the Asbestos Insurers Commission.

This section authorizes the Commission to conduct rulemakings for the purpose of implementing its authority under the Act. The Commission may hold hearings, sit and act at such times, take testimony and receive evidence as it considers advisable. The Commission may secure directly from any Federal agency such information as the Commission considers necessary to carry out this act, and may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal government. The Commission may not accept, use, or dispose of gifts or donations of services or property. The Commission may also enter into contracts as it deems necessary to obtain expert advice and analysis.

Sec. 214. Personnel Matters.

Each member of the Commission shall be paid a daily equivalent of the annual rate for Level IV of the Executive Schedule. Members of the Commission shall be allowed travel expenses including per diem in lieu of subsistence consistent with that permitted for federal agency employees. The Chairman of the Commission may appoint and terminate an executive director and such other additional personnel as may be necessary to enable the Commission to perform its duties. The employment of the executive director shall be subject to confirmation by the Commission. The Chairman of the Commission may set the rate of compensation of staff but it must not exceed Level V of the Executive Schedule. Any federal government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege. The Chairman of the Commission may procure temporary and intermittent services at rates that do not exceed Level V of the Executive Schedule.

Sec. 215. Termination of Asbestos Insurers Commission.

The Commission shall terminate 60 days after the date on which the Commission submits its report.

Sec. 216. Expenses and Costs of Commission

All expenses and costs of the Commission shall be paid by the Asbestos Injury Claims Resolution Fund.

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Subtitle C. Asbestos Injury Claims Resolution Fund

Sec. 221. Establishment of the Asbestos Injury Claims Resolution Fund.

This section establishes within the Office of Asbestos Disease Compensation, the Asbestos Injury Claims Resolution Fund. This Fund is established to pay claims deemed eligible for compensation for an eligible disease or condition, reimbursement for medical monitoring, principal and interest on amounts borrowing, and administrative expenses under the authority of this subsection.

Borrowing Authority: The Administrator is authorized to borrow, in any calendar year, an amount not to exceed all amounts expected to be paid by participants during the subsequent 7 years. The Administrator must take into account all payment obligations related to previous amounts borrowed and all committed obligations of the Fund at the time of borrowing. In addition to the Administrator's general borrowing authority, the Administrator may borrow from the Federal Financing Bank in accordance with section 6 of the Federal Financing Bank Act of 1973 as needed for the performance of the Administrator's duties for the first 2 years. Repayment of monies borrowed by the Administrator is limited solely to amounts available in the Asbestos Injury Claims Resolution Fund.

Lockbox for Severe Asbestos-Related Injury Claimants: This section authorizes the Administrator to establish four separate lockbox accounts to protect the funds needed to compensate the victims with the most severe asbestos-related injuries: mesothelioma, lung cancer with asbestosis, lung cancer with pleural disease, other cancer and disabling asbestosis. The Administrator shall allocate to each of these accounts a portion of payments to the Fund to compensate anticipated claimants for each account. Funds will be allocated to these accounts based on the best epidemiological and statistical studies.

Audit Authority: This sections grants the Administrator audit authority to examine data, summon persons and materials, and take testimony for the purpose of ascertaining the veracity of information provided, determining outstanding liabilities, or inquiring into any offense connected with the administration or enforcement of payment obligations.

No Private Right of Action: There shall be no private right of action under any State or Federal law against any participant based on a claim of compliance or noncompliance with the FAIR Act or the involvement of any participant in the enactment of the FAIR Act.

Sec. 222. Management of the Fund.

Amounts in the Fund shall be held for the exclusive purpose of providing benefits to asbestos claimants and their beneficiaries and to otherwise defray the reasonable expenses of administering the Fund. The Administrator shall invest amounts in the Fund in a manner that enables the Fund to make current and future distributions to or for the benefit of asbestos claimants, taking into account the nature of the Fund and relevant outside factors.

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Mesothelioma Research and Treatment Centers: The Administrator shall provide \$ 1 million from the Fund for fiscal years 2004 through 2008 for each of up to 10 mesothelioma disease research treatment centers. The bill provides criteria for the selection of the centers.

Sec. 223. Enforcement of Payment Obligations.

If any participant fails to make any payment in the amount of and according to the payment schedule or as prescribed by the Administrator, after demand and 30 days opportunity to cure the default, there shall be a lien in favor of the United States for the amount of the delinquent payment including interest. In the case of a bankruptcy or insolvency proceeding, the lien shall be treated in the same manner as a lien for taxes due and owing to the United States.

In any case where there has been a refusal or neglect to pay an assessment, the Administrator may bring a civil action in the United States District Court for the District of Columbia, or other appropriate lawsuit or proceeding outside of the United States. In any action involving a willful refusal to pay, the Administrator is authorized to recover punitive damages, including costs and attorneys fees, and may collect a fine equal to the total amount of the liability not collected.

Enforcement Authority as to Insurer Participants: In addition to other enforcement provisions, the Administrator may seek to recover amounts in satisfaction of a contribution not timely paid by an insurer in the following manners:

Subrogation – The Administrator holds subrogation rights against non-paying insurers domiciled outside of the United States.

Recoverability of Contribution – This section provides that contributions to the Fund are sums legally required to be paid for bodily injury resulting from asbestos exposure. Contributions are also deemed to be (i) a single loss arising from a single occurrence under each contract to which the Administrator is subrogated and (ii) a payment to a single claimant for a single loss with respect to reinsurance contracts.

No Credit or Offset - In any action brought under this section, the nonpaying insurer participant shall not be entitled to a credit or offset for amounts collectable from any participant or a right to collect any sums payable from a participant.

Intervention/Cooperation – The insured of the nonpaying insurance participant may intervene as parties in any proceeding and shall cooperate with the Administrator reasonable requests for cooperation for assistance in such proceedings. The Administrator shall have the power to settle or compromise any claims against an insurer participant.

Bar on US Business – If any insurance participant refuses to submit information or pay a contribution obligation, then in addition to other penalties, the Administrator may issue an order barring such entity and its affiliates from conducting business within the United States. Such entities shall be barred from obtaining a license from any State to write insurance until payment of all contributions.

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Credit for Reinsurance – If the Administrator determines that a reinsurer insurer participant is in default in paying a contribution obligation or otherwise not in compliance, the Administrator may issue an order barring any direct insurer participant from receiving credit for reinsurance purchased from the defaulting reinsurer.

Defense Limitations: In any enforcement proceeding, the participant is barred from bringing any challenge to the determination of the Administrator or the Commission regarding its liability under or the constitutionality of the FAIR Act, if such a challenge could have been made during the review periods provided or a judicial review proceeding.

Deposit of Funds: Any funds collected as a fine equal to the total amount of the participant liability shall be deposited in the Fund and used only to pay claims for awards for eligible asbestos-related diseases or claims for reimbursement for medical monitoring.

Sec. 224. Interest on Underpayment of Nonpayment.

If any payment obligation is not paid on or before the last date prescribed for payment, the liable party shall pay interest on that amount at the Federal short-term rate determined under section 6621(b) of the Internal Revenue Code of 1986, plus 5 percentage points until the date paid.

TITLE III. JUDICIAL REVIEW

Sec. 301. Judicial Review of Rules and Regulations.

The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any action to review rules or regulations promulgated by the Administrator or Asbestos Insurance Commission. A petition for review shall be filed not later than 60 days after the date notice of such promulgation appears in the Federal Register.

Sec. 302. Judicial Review of Award Decisions.

Any claimant adversely affected or aggrieved by a final decision of the Administrator regarding compensation may petition for judicial review of the decision by filing a petition of review in the United States Court of Appeals for the circuit in which the claimant resides within 90 days of the issuance of a final decision of the Administrator. The court shall uphold the decision of the Administrator unless the court determines, upon review of the record as a whole, that the decision is not supported by substantial evidence, contrary to law, or is not in accordance with procedure required by law.

Sec. 303. Judicial Review of Participants Assessments.

The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any action to review a final determination regarding the liability of any person to make a payment to the Fund, including a notice of applicable subtier assignment, notice of insurer participant obligation, and a notice of financial

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hardship or inequity determination. A petition for review shall be filed not later than 60 days after a final determination giving rise to the action. Any defendant participant who receive notices of its applicable subtier assignment and any insurer participant who receives notice of a payment obligation must commence an action within 30 days of receiving such notice.

Sec. 304. Other Judicial Challenges.

The United States District Court for the District of Columbia shall have exclusive jurisdiction over any action for declaratory or injunctive relief challenging any provision of the FAIR Act. Such action shall be filed not later than 60 days after the date of enactment or 60 days after the final action by the Administrator giving rise to the action, whichever is later.

A final decision in the action shall be reviewable on appeal directly to the Supreme Court of the United States and shall be taken by filing a notice of appeal within 30 days, and the filing of a jurisdictional statement within 60 days, of the entry of a final decision.

Such actions shall be advanced on the dockets and subject to an expedited review process.

Sec. 305. Stays, Exclusivity, and Constitutional Review.

The courts may not issue a stay of a payment obligation pending its final judgment and an action for which review is otherwise provided for by the FAIR Act shall not be subject to judicial review in any other proceeding.

Constitutional Review: Any interlocutory or final judgment, decree, or order of a Federal court holding the FAIR Act, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court of the United States by filing such an appeal not more than 30 days after the entry of such judgment, decree, or order.

TITLE IV. MISCELLANEOUS PROVISIONS

Sec. 401. False Information.

This section amends Title 18, Chapter 63 of the U.S. Code by adding a new section 1348 to impose criminal penalties for fraud and false statements made against the Asbestos Injury Claims Resolution Fund by any party.

Sec. 402. Effect on Bankruptcy Laws.

Contribution obligations are not dischargeable and may not be stayed when a participant files for bankruptcy. Claims by the Administrator against a participant are allowed even in bankruptcy. Participants' payment pending bankruptcy or in bankruptcy are not avoidable as preferences or executory contract.

Transfer of Existing Asbestos Trusts: Existing asbestos trusts, including 524(g) trusts, will be incorporated into the Asbestos Injury Claims Resolution Fund. The assets of such trusts shall be transferred to the Fund no later than 6 months after the date of enactment of the FAIR Act. The Administrator shall have discretion when transferring

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assets of these trusts and may refuse to accept any asset that may create liability for the Fund in excess of the value of the asset. For trusts with beneficiaries that are not asbestos claims, the assets transferred to the Fund shall not include assets allocable to non-asbestos-related beneficiaries. Incorporation of trust assets is estimated to provide an additional \$4-6 billion in contributions to the fund.

Effect on Insurance Receivership Proceedings: In any insurance receivership proceeding involving an insurer participant, there shall be a lien in favor of the Fund for the amount of any assessment and any such lien shall be given priority over all other claims against the participant in receivership, except for the expenses of the receivership. Payment of any assessment shall not be subject to any stay in any insurance receivership proceeding.

Sec. 403. Effect on Other Laws and Existing Claims.

This section provides that there will be no other forum for recovery of an asbestos injury claim other than under the FAIR Act. (Note: This section further provides that certain specified claims relating to handling, settlement, or judgment of an asbestos claim may not be brought in State or Federal court.) Claims pending as of the date of enactment will be preempted by the FAIR Act, except those “which an order or judgment has been duly entered by a court that is no longer subject to any appeal or judicial review...” Non-final settlements and judgments that are still subject to appeal are included in the preemption. If a state court does not dismiss a claim, it may be removed to federal court, which will determine whether removal was proper and whether the claim presented is an asbestos claim as defined by the FAIR Act.

Notwithstanding the express preemption of pending cases by the FAIR Act, if a court determines that an asbestos claim for which there has been no order or judgment duly entered before the date of enactment is not subject to the preemption provisions and requires a participant to satisfy a judgment with respect to the claim, then the participant will receive a credit against any assessment owed to the Fund equal to the amount of the payment made with respect to the judgment. The Administrator shall require participants seeking credit to demonstrate that the participant pursued timely remedies, including dismissal of the claim. The participant must have also notified the Administrator of the denial of a motion to dismiss within 20 days of the expiration of the period to seek appeal. The Administrator may require as much further information as is necessary and appropriate to establish eligibility for and the amount of such a credit.

Sec. 404. Effect on Insurance and Reinsurance Contracts.

Because most insurance policies cover multiple liabilities, it was necessary to account for “erosion” of a policy that covers not only asbestos liabilities, but potentially other liabilities such as property or other environmental liabilities when assessing contribution obligations to the fund in order to avoid depriving insureds of coverage for other non-asbestos related claims. This section establishes how contributions to the Fund by insurers and reinsurers reduce the limits of existing insurance policies held by the Defendant Participants. The quantum of erosion is based on the collective payment obligations to the Fund by the insurer and reinsurer participants. The payment obligations are deemed as of the date of enactment to erode remaining aggregate product limits available to a defendant participant in an amount of 59.64% of each defendant

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participant's scheduled assessment amount. The erosion principles apply to the mandatory payment obligations to the Fund. However, any contingent payment required by the Administrator of any defendant participant shall not be deemed to erode remaining aggregate product limits.

Restoration of Aggregate Product Limits Upon Early Sunset: In the event of an early sunset of the Fund, any unearned erosion amount will be deemed restored as aggregate product limits available to the defendant participant as of the date of enactment. Such amounts will be deemed restored to each policy in such a manner that the last limits deemed eroded at enactment of the FAIR Act are to be the first limits restored at the early sunset. The applicable statute of limitations and contractual provisions for filing claims under any insurance policy with restored aggregate product limits shall be deemed tolled from the date of enactment through 6 months after the date of the early sunset.

Finite Risk Policies Not Affected: Notwithstanding any other provision of this Act, the FAIR Act shall not alter, affect or impair any rights or obligations of any party to an insurance contract that expressly provides coverage for governmental obligations imposed to replace insurance or reinsurance liabilities in effect on the date of enactment or any person who purchased finite risk policies that expressly provide coverage for asbestos liabilities from any insurance or reinsurance participant after December 31, 1996. Such finite risk policies must specifically provide coverage for required payment to a Federal trust fund established by a Federal statute to resolve asbestos injury claims.

Effect on Certain Insurance and Reinsurance Claims: No participant may pursue an insurance or reinsurance claim against another participant for payments to the Fund, except under a contract specifically providing insurance or reinsurance for required payments to a Federal trust fund established by a Federal statute to resolve asbestos injury claims or under finite risk policies.

Any assignment of any rights to coverage for asbestos claims to any person who has asserted an asbestos claim prior to the effective date, or to any trust, person, or entity established to pay asbestos claims, shall be null and void.

The FAIR Act does not affect or impair any rights or obligations of any person for amount that is obligated to pay with respect to asbestos or other claims except as otherwise provided by the FAIR Act.

Sec. 405. Annual Report of the Administrator.

This section requires the Administrator to submit an annual report to the Senate Committee on the Judiciary and House Committee on the Judiciary concerning the operation of the Asbestos Injury Claims Resolution Fund. The section specifies the contents of the report which includes summaries, estimates, recommendations, and an analysis of the financial condition of the fund, including the ability of the Fund to pay claims for the subsequent 5 years in full and as required.

Claims Analysis: If the Administrator concludes on the basis of the annual report that the Fund is compensating claims for injuries that are not primarily asbestos-related

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and that compensating such claims undermines the integrity of the Fund, then the Administrator must include in the annual report a statement of the situation and recommendations as to how to respond.

If the Administrator determines that the Fund may not be able to pay claims as they come due at any time within the next 5 years, then the Administrator must include a statement of the situation, including an estimate of how much longer the Fund will be able to pay claims and recommendations as to how to respond. Any recommendation of termination should include a plan for winding up the affairs of the Fund within a defined period.

Sunset of Act: If, at any time after 7 years following the date on which the Administrator begins processing claims, the Administrator determines that the Fund will not have sufficient resources to pay all resolved claims and debt obligations, the Fund will stop paying awards 180 days after the Administrator's determination. Participants will be required to continue to make payments as required by the FAIR Act. The Administrator may reduce such payments only upon determination that the full amounts are not required to pay all outstanding obligations of the Fund. Any reduction shall be allocated among participants in approximately the same proportion to their liability.

Nature of Claim After Sunset – After termination of the Fund, the United States district courts for the judicial district where the claimant resides shall have exclusive jurisdiction to hear claims by individuals suffering asbestos-related injuries, except for those individuals compensated by the Fund. Such actions shall be governed by Federal common law.

Sec. 406. Rules of Construction Relating to Liability of the United States Government.

Except as otherwise specifically provided in this Act, nothing in this Act may be construed as creating a cause of action against the United States government, any entity established under this Act, or any officer or employee of the United States government or such entity. In addition, it should not be construed in any way to create an obligation of funding from the United States government, other than funds for personnel or support as specifically provided in this legislation.

Sec. 407. Rules of Construction.

Nothing in this Act shall preclude the formation of a fund for the payment of eligible medical expenses related to treating asbestos-related disease for current and former residents of Libby, Montana.

Nothing in this Act shall be construed to preclude any eligible claimant from receiving health care from the provider of their choice.

Sec. 408. Violations of Environmental and Occupational Health and Safety Requirements.

This section requires the Administrator to refer any information relating to violation of the Toxic Substances Control Act, the Clean Air Act, or the Occupational Safety and Health Act to the Secretary of Labor, to the Administrator of the EPA or the United States Attorney for possible civil or criminal prosecution and penalties.

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This section also directs the United States Sentencing Commission to review and amend, as appropriate, the United States Sentencing Guidelines regarding environmental crimes relating to asbestos to ensure that the penalties are sufficient to deter and punish future activity and for other reasons.

Sec. 409. Nondiscrimination of Health Insurance.

A health insurer may not deny, terminate, or alter the terms of coverage of the health plan of a claimant or beneficiary of a claimant because of participation in a medical monitoring program or as a result of information discovered as a result of medical monitoring. This section amends Section 702(a)(1) of the Employee Retirement Income Security Act of 1974, Section 2702(a)(1) of the Public Health Service Act, and Section 9802(a)(1) of the Internal Revenue Code of 1986 to conform with this provision

TITLE V. ASBESTOS BAN

This section amends Title II of the Toxic Substance Control Act to prohibit the manufacture, distribution and importation of consumer products to which harmful asbestos is deliberately or knowingly added. This section also contains specific exemptions and authorizes the Administrator to hear and grant exemptions on a case by case basis. The Committee found precedence and structured this section in large part on an asbestos ban implemented by the Environmental Protection Agency in 1989. Although this regulatory ban was invalidated by the Fifth Circuit on mainly procedural grounds, this section implements it legislatively and it is the Committee's intent that the Administrator use the 1989 Environmental Protection Agency regulations as a guide towards implementing the ban and relevant exceptions under this section. The Committee recommends that the EPA consider, consistent with its prior regulations, among other issues: 1) whether to create a two-stage ban with a manufacturing ban first and a distribution in commerce ban phased in after a proper time delay; 2) whether to provide a labeling mechanism to identify an asbestos containing product as soon as practicable after date of enactment; and 3) whether to provide an enforcement standard that requires a violation under the ban to be knowing and willful.

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